173

No. 10-58

SUPREME COURT, U.S.
FILED

# In the
# Supreme Court of the United States

MARK EDW. ANDREWS,
*Petitioner,*

v.

D. DOUGLAS HOWARD, JR.,
*Respondent.*

*On Petition for Writ of Certiorari*
*to the United States Court of Appeals*
*for the Fifth Circuit*

## PETITIONER'S REPLY BRIEF

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## QUESTIONS PRESENTED

(No change from Petition as filed)

After being sued for malicious prosecution in state court for prior litigation in federal court, defendant attorney removed to the same federal court, on both federal-question and officer-of-the-court grounds. The district court remanded and ordered fee shifting. Defendant appealed the fee shifting and quantum of award, which were affirmed by the circuit court, with the addition of Rule-38 sanctions for frivolous appeal.

1. Is officer-of-the-court removal under 28 USC §1442 categorically unavailable to admitted attorneys?

2. Is fee shifting on remand under 28 USC §1447(c) properly imposed in the absence of clearly-established law demonstrating a lack of reasonable basis for removal?

3. Is an appeal on an unresolved or novel question frivolous and sanctionable under F.R.A.P. Rule 38?

4. May lodestar analysis of fee shifting be bypassed if a court regards litigation to be vexatious?

## RULE 14.1(B) STATEMENT

(No change from Petition as filed)

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

*Plaintiff-Appellee and Respondent*:

Desmond Douglas Howard, Jr., Attorney at Law, is a natural person of majority, admitted to practice in Louisiana, Bar. No. 7021, maintaining a professional office in New Orleans, Louisiana.

*Defendant-Appellant and Petitioner*:

Mark Edw. Andrews, Attorney at Law and Registered U.S. Patent Attorney, is a natural person of majority, admitted as an attorney in Louisiana (No. 26172) and California (No. 232519), maintaining a professional office in New Orleans, Louisiana.

*Other Defendants-Appellants below*:

Andrews Arts & Sciences Law, LLC, organized in Louisiana, is the solo-practice law firm of Mark Edw. Andrews.

Lesley Simmons St. Germain is a natural person of majority and resident of New Orleans, Louisiana.

Hillary Rose Smith is a natural person of majority and resident of New Orleans, Louisiana.

Melissa Branighan is a natural person of majority and resident of Jefferson Parish, Louisiana.

David E. Simmons, DDS, is a natural person of majority and resident of New Orleans, Louisiana, and is the father of Lesley Simmons St. Germain.

## TABLE OF CONTENTS

Questions Presented . . . . . i
Rule 14.1(b) Statement . . . . . ii
Table of Authorities . . . . . iv
Opinion Below . . . . . 1
Selected Relevant Statute . . . . . 1
Additional Statement . . . . . 2
Reply . . . . . 3
A. Attorneys' practice, discipline, and status as officers of the federal courts is in this Supreme Court's bailiwick. . . . . 3
B. These questions are extraordinarily important in daily practice before state and federal courts. 3
C. This case invites review of the law unencumbered by issues of fact. . . . . 4
D. This case presents an appropriate vehicle for resolution of the questions presented. . . . . 5
E. These questions will only rarely be presented in a favorable posture for review. . . . . 6
F. The Petition identified several extraordinarily-important things wrong with the decision below, warranting certiorari, and Respondent has not effectively countered anything. . . . . 6
G. The circuit court reached past the actual issues on appeal, and made the issue of officer-of-the-court removal part of the actual case here. . . . . 7
H. This case squarely presents the rule missing in *Martin*—a rule regarding reasonableness. . . 8
I. Prior federal-court litigation—vexatious or not—plays no proper part in determining §1447(c) fee shifting or Rule-38 sanctions. . . . . 10
J. Fifth-Circuit misapprehension of *Willingham* is prejudicial and is Respondent's fault. . . . . 11
Respondent's Misstatement of the Case . . . . . 11
Conclusion . . . . . 12

## TABLE OF AUTHORITIES

### Cases

*Cammer v. U.S.*, 350 U.S. 399 (1956) . . . . . 6, 8
*Estiverne v. Saks Fifth Avenue*,
93-3317 (CA5 12/28/2002) 8 F.3d 1171 . . . . . 7
*Herron v. Continental Airlines, Inc.*,
95-10645 (CA5 1/23/1996) 73 F.3d 57 . . . . . 5
*Howard v. St. Germain, et al.*,
09-30642 (CA5 3/5/2010) 599 F.3d 455 . . . . . 9, 10
*In re High Sulfur Content Gasoline Products Liab.*,
07-30384 (CA5 2/4/2008) 517 F.3d 220 . . . . . 10
*Lott v. Pfizer, Inc.*,
06-3372 (CA7 6/25/2007) 492 F.3d 789 . . . . . 9
*Lussier v. Dollar Tree Stores, Inc.*,
06-35148 (CA9 3/7/2008) 518 F.3d 1062 . . . . . 9
*Macklin v. City of New Orleans*,
01-31039 (CA5 7/25/2002) 300 F.3d 552 . . . . . 7
*Martin v. Franklin Capital Corp.*,
546 U.S. 132 (2005) . . . . . 7, 8, 9
*McCuin v. Texas Power*,
82-2230, 83-2115, (CA5 9/19/1983) 714 F.2d 1255. 4
*Miranti v. Lee*, 92-3576 (CA5 10/7/1993) 3 F.3d 925. . 9
*St. Germain, et al. v. Howard, et al*,
08-30364 (CA5 1/20/2009) 556 F.3d 261 . . . . . 9, 10
*Valdes v. Wal-Mart Stores, Inc.*,
99-20519 (CA5 1/12/2000) 199 F.3d 290 . . . . . 9
*Watson v. Philip Morris Cos.*, 551 U.S. 142 (2007) . . . 8
*Willingham v. Morgan*, 395 U.S. 402 (1969). . . 7, 8, 11

### Codes, Statutes, & Rules

28 USC §1367 . . . . . 6
28 USC §1441. . . . . 2, 5
28 USC §1442 . . . . . 2, 4, 7, 8
28 USC §1447. . . . . 3, 4, 7, 8, 9
Fed. Rules of App. Proc., Rule 38 . . . . . 3, 4, 7, 10, 12

# PETITIONER'S REPLY BRIEF

## OPINION BELOW
(Updated Information)

The published Fifth-Circuit opinion, *Howard v. St. Germain, et al.*, 09-30642 (CA5 3/5/2010), was reported at 599 F.3d 455.

## SELECTED RELEVANT STATUTE
(From Appendix F of Petition)

**28 USC §1442. Federal officers or agencies sued or prosecuted**

(a) A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

(2) A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.

(3) Any officer of the courts of the United States, for any act under color of office or in the performance of his duties;

(4) Any officer of either House of Congress, for any act in the discharge of his official duty under an order of such House.

[...]

## ADDITIONAL STATEMENT

The lawsuit for defamation and malicious prosecution for the prior filing of a civil-RICO lawsuit in federal court—filed in state court against an attorney and his clients—was removed on §1442 and other, §1441 grounds. The officer-of-the-court removal was not based on some technicality that the attorney was admitted in federal court, but was based on the attorney being sued explicitly for acting as the attorney in specific prior federal litigation in the same federal court—a specific case, having Case Nos. 07-9040 in the Eastern District of Louisiana, 08-30364 in the federal Fifth Circuit, and 08-1296 in the Supreme Court of the U.S. The plaintiff's amended state-court complaint even explicitly quoted the words the sued attorney spoke at oral argument before the federal Fifth Circuit in the *prior federal litigation*.[1]

Although neither timing nor timeliness was addressed in the various orders and opinions below, timing was an important factor in the litigation. Louisiana's version of the anti-SLAPP statute, La. Code of Civil Procedure Article 971, says that a Special Motion to Strike is to be heard within 30 days of service—because the law is meant to effect speedy dismissal of bogus lawsuits. The state trial court's allowing the plaintiff to delay beyond the law's 30-day provision steered this lawsuit toward removal in two ways: it allowed time for the plaintiff to amend his suit to add removable claims, and it encouraged the defendants to consider a more favorable federal forum.

After remand, the state forum proved to be as unfavorable as feared—although the retaliatory lawsuit was ultimately dismissed in a supervisory writ by the state appeals court—7 months after remand.

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1. Amended state-court complaint, p.10, Record at USCA5-57.

## REPLY

### A. Attorneys' practice, discipline, and status as officers of the federal courts is in this Supreme Court's bailiwick.

No matter what Respondent says, the questions of attorneys removing cases and being assessed fee shifting and sanctions in their practice before the federal courts are of concern to this Supreme Court. With its responsibility over all courts and attorneys, this Court can properly clarify the definition of "officer of the court" and calibrate the risks of punishment faced by removing and appealing attorneys.

### B. These questions are extraordinarily important in daily practice before state and federal courts.

Attorneys must quickly—within 30 days—evaluate whether removal is available and beneficial to the clients, and whether removal might bring punishing fee shifting or sanctions. This is extraordinarily important, and could benefit from as much clarity and guidance as this Supreme Court can give. When, as here, a published appeals-court opinion adds Rule-38 sanctions for appealing the §1447(c) fee shifting and quantum, the substantial threat of punishment creates a deterrent to removal in all but the most obviously safe cases.

In the Fifth Circuit—now—even if an attorney performs diligent research and finds no caselaw, the absence of caselaw is no defense against fee shifting and sanctions. And if a court regards *prior* litigation to have been "vexatious", then a lodestar analysis may be skipped and the quantum of fees may be summarily set—increasing the *in-terrorem* consequences of filing a notice of removal asserting any untested grounds.

The Fifth Circuit's disregard of absence of caselaw as an indicator against fee shifting, and the broad, categorical exclusion of admitted attorneys ever removing as officers of the court under §1442, makes removal on any untested grounds a scary proposition, and forecloses even the possibility of any future §1442(a)-removal by an attorney even under hypothetically-perfect facts.

In 1983, the Fifth Circuit's Judge Rubin observed the propriety—even the necessity and duty—of seeking a favorable federal forum.[2] Many attorneys will face this question for many years to come. Those attorneys will have 30 days—fewer in practice—to find out if existing law forecloses removal. Under the Fifth Circuit's published opinion here, those attorneys and their clients will be under a threat of punishing fee-shifting even where several days of research yields no caselaw whatsoever to inform their specific removal questions.

Lodestar analysis of attorney fees occurs daily in federal courts. Whether lodestar analysis may properly be bypassed and influenced by consideration of *prior* litigation is an extraordinarily important question.

### C. This case invites review of the law unencumbered by issues of fact.

This case is the opposite of fact-bound. Here, both the district and circuit courts overlooked the facts of the case and declined to follow the proper rules and standards—electing instead to follow an older discretionary standard, and identifying the "vexatious" nature of the prior federal litigation as justification for both the §1447(c) and Rule-38 fee awards.

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2. *McCuin v. Texas Power*, 82-2230, 83-2115, (CA5 9/19/1983) 714 F.2d 1255, 1261-62.

Petitioner regards the one truly significant fact to be this: there was an in-circuit case[3] indicating in *dicta* that officer-of-the-court removal by an attorney was an unreached, unresolved question. Respondent has provided many details about this significant fact. Respondent's Appendix contains a transcript of the district court hearing where, on pages 12a–21a, a sense of the tone of the proceedings may be gleaned. Respondent contends in his conclusion (p.15) and throughout that "petitioner was unable to cite any legal support for removal", which is wrong, and which mischaracterizes the circumstance that there was no caselaw on attorneys removing as officers of the court.

### D. This case presents an appropriate vehicle for resolution of the questions presented.

This case presents the issues cleanly. No extraneous issues are lurking about. Respondent (p.5) makes an attempt to confuse the case, including trying to raise a question of whether those defendants below who did not petition this Supreme Court will be stuck with the sanctions—an impossibility since the full $12,955 has already been paid by the Petitioner, and if this Petition results in vacated sanctions, they are vacated for all.

Respondent (p.7–11) extensively covers the other, §1441 federal-question grounds for removal that were asserted, although Respondent misstates the critical issue. In truth, Howard amended his main claims to include malicious prosecution for the defendants refiling legal-malpractice claims in state court against Howard, where those legal-malpractice claims had been dismissed without prejudice from federal court and were therefore tolled and protected by federal law

3. *Herron v. Continental Airlines, Inc.*, 95-10645, note 2 (CA5 1/23/1996) 73 F.3d 57, 59.

28 USC §1367(d). Although the Respondent's Brief confirms Petitioner's contention that arguably-reasonable alternative grounds for removal were stated, the Respondent's re-hashing the merits of the remand itself is not germane to the questions presented here.

### E. These questions will only rarely be presented in a favorable posture for review.

It is to be hoped that this type of defamation and malicious-prosecution lawsuit in retaliation for prior litigation will not often be filed or will be quickly stricken under anti-SLAPP laws, and therefore will not need to be removed. If some intrepid attorney does remove such a lawsuit—in the teeth of the Fifth Circuit's opinion here—then it will be a matter of chance whether any remand or refusal to remand will be reviewed. Also, future litigants twice-popped for sanctions—as here—are unlikely to have the stomach for further appeal. Therefore, another, better opportunity to examine these issues is unlikely to come soon.

### F. The Petition identified several extraordinarily-important things wrong with the decision below, warranting certiorari, and Respondent has not effectively countered anything.

Respondent's contentions (p.5–7) notwithstanding, the Petition here shows that there was no controlling caselaw whether an admitted attorney can remove as an officer of the court, and therefore the removing attorney here should not have been punished with fee shifting and sanctions. The *Cammer*[4] decision's analysis of the "ordinary meaning" of "officer of the court" may well be highly informative and a good place to

4. *Cammer v. United States*, 350 US 399 (1956).

start analyzing removal, but the *Cammer* decision said nothing at all about removal and cannot *control* here. The *Willingham*[5] decision was just flat-out mis-cited.

Also, the circuit court decided an issue not before it by ruling that attorneys categorically cannot remove as officers of the court; the lodestar analysis of the fees should not have been bypassed—no matter how vexatious the prior federal litigation was; and no Rule-38 sanctions should have been ordered because an appeal of a novel or unresolved question or a question of first impression is not considered frivolous or sanctionable[6].

Respondent's Brief completely omits and ignores the controlling *Martin v. Franklin Capital*[7] case, and fails to cite even a single case about §1447(c) fee shifting or Rule-38 sanctions.

### G. The circuit court reached past the actual issues on appeal, and made the issue of officer-of-the-court removal part of the actual case here.

Respondent Howard contends (p.13–15) that the Petition is just a disguised appeal of the remand of Howard's defamation and malicious-prosecution case back to state court, but that is absurd because the state appeals court has finally-dismissed Howard's lawsuit under the anti-SLAPP law and ordered sanctions against Howard. The only issues still before the state courts are the quantum of sanctions against Howard and the legal-malpractice counterclaims against him.

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5 *Willingham v. Morgan*, 395 U.S. 402 (1969)

6 *Macklin v. City of New Orleans*, 01-31039 (CA5 7/25/2002) 300 F.3d 552, 554; *Estiverne v. Saks Fifth Avenue* 93-3317 (CA5 12/28/2002) 8 F.3d 1171, 1174

7 *Martin v. Franklin Capital Corp.*, 546 U.S. 132 (2005)

The reason the actual remand in *this* case was not before the circuit court was because it was expressly *not* appealed. Whether or not it could have been appealed does not matter since it was not appealed. It is not clear whether §1447(d) blocks review of remand of a removal under §1442(a)(3) because there is no caselaw. That is a major point in this Petition—there is no caselaw, so there should be no fee shifting and sanctions. Overlooking that the remand itself was expressly not appealed, the circuit court published an opinion stating flatly that attorneys cannot remove as officers of the court under 28 USC §1442(a), and so the Fifth Circuit made that question an issue in this case.

The circuit court held that attorneys cannot remove as officers of the court, but that holding was based on two old cases, *Cammer*[8] and *Willingham*[9], both decided long before the 1996 amendments to 28 USC §1442. One of the many critical questions *not* addressed by the Fifth Circuit is this: if private persons or contractors operating under the authority and control of federal officers can remove under §1442(a)(1),[10] why are private attorneys operating under the authority and control of federal courts not allowed to remove under §1442(a)(3)?

### H. This case squarely presents the rule missing in *Martin*—a rule regarding reasonableness.

In *Martin v. Franklin Capital*,[11] the parties there agreed removal was reasonable, and therefore the Court was constrained from providing a practical rule or standard of reasonableness. This absence was noted

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8. *Cammer v. United States*, 350 U.S. 399 (1956).

9. *Willingham v. Morgan*, 395 U.S. 402 (1969).

10. *Watson v. Philip Morris Cos.*, 551 U.S. 142 (2007).

11. *Martin v. Franklin Capital Corp.*, 546 U.S. 132 (2005).

and solved by the Seventh Circuit in *Lott v. Pfizer*:

> As a general rule, if, at the time the defendant filed his notice in federal court, clearly established law demonstrated that he had no basis for removal, then a district court should award a plaintiff his attorneys' fees. By contrast, if clearly established law did not foreclose a defendant's basis for removal, then a district court should not award attorneys' fees.[12]

In formulating the rule, the Seventh Circuit relied explicitly[13] on the Fifth-Circuit *Valdes*[14] case which had been cited with approval in *Martin*. The Seventh Circuit's *Valdes*-based reasoning was, in turn, explicitly followed by the Ninth Circuit.[15] Wherever the issue has arisen, the other circuits are following the Fifth Circuit's *Valdes*—except for the Fifth Circuit itself, which has overlooked *Valdes* and reverted to an older[16] "discretion" standard instead of Chief Justice Marshall's discretion standard as restated[17] in *Martin*.

Development of the rule missing in *Martin* was progressing smoothly through the Seventh and Ninth Circuits, but it went off the rails in the Fifth Circuit in this case. The useful and clear rule was briefed to both the district and the appeals courts, who rejected it without comment. The Fifth Circuit overlooked the rule and affirmed §1447(c) fee shifting on the basis of

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12. *Lott v. Pfizer, Inc.*, 06-3372 (CA7 6/25/2007) 492 F.3d 789, 793.

13. *Lott v. Pfizer, Inc.*, 06-3372 (CA7 6/25/2007) 492 F.3d 789, 792.

14. *Valdes v. Wal-Mart Stores, Inc.*, 99-20519 (CA5 1/12/2000) 199 F.3d 290, 293.

15. *Lussier v. Dollar Tree Stores, Inc.*, 06-35148 (CA9 3/7/2008) 518 F.3d 1062, 1066.

16. *Miranti v. Lee*, 92-3576 (CA5 10/7/1993) 3 F.3d 925.

17. *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139 (2005).

the district court's *discretion upon remand*, and then added Rule-38 sanctions for a frivolous appeal on top of that. Whether the rejection of that rule here is a conflict among circuits or a conflict with existing in-circuit precedent is an arguable point, but in any case it warrants certiorari, and this opportunity to examine the rule missing in *Martin* is important enough to be taken up by this Supreme Court.

## I. Prior federal-court litigation—vexatious or not—plays no proper part in determining §1447(c) fee shifting or Rule-38 sanctions.

Respondent's Brief highlights how the courts below justified §1447(c) fee-shifting and Rule-38 sanctions by discussing the vexatious nature of the *prior federal litigation*—which the circuit court even refers to as "*Howard I*"[18], and which is the same prior federal litigation that the Defendants reasonably thought gave them grounds to remove the later retaliatory lawsuit. Courts are supposed to avoid summary approval of fees in all cases.[19] Respondent (p.12) misstates the record where he contends that the Fifth Circuit did apply a lodestar analysis. The record shows otherwise. Respondent provides (p.9) a page from the 24 June 2010 hearing transcript where the district court revealed that the fee shifting was, in effect, sanctions for the *prior federal litigation*; and also provides (p.10) the Fifth Circuit's language in its 5 March 2010 decision revealing that the Rule-38 sanctions were based as much on the prior "*Howard I*" case as on the case then at bar.

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18. App. A to the Petition at p.4a, *Howard v. St. Germain, et al.*, 09-30642 (CA5 3/5/2010) 599 F.3d 455, *citing (as "Howard I") St. Germain, et al. v. Howard, et al.*, 08-30364 (CA5 1/20/2009) 556 F.3d 261.

19. *In re High Sulfur Content Gasoline Products Liab.*, 07-30384 (CA5 2/4/2008) 517 F.3d 220, 227.

### J. Fifth-Circuit misapprehension of *Willingham* is prejudicial and is Respondent's fault.

Respondent contends (p.4) that the circuit court's misapprehended misstatement of the Supreme Court's 1969 *Willingham v. Morgan*[20] opinion is correct—that *Willingham* actually speaks to attorneys removing as officers of the court. But that is completely wrong, and this new law announced by the Fifth-Circuit opinion here is based on a serious flaw. The circuit court states that *Willingham* held that the federal-officer removal statute was "not intended for a private attorney to use to remove a state action to federal court on the basis that he was an 'officer of the court'",[21] when, in fact, the *Willingham* case had nothing at all to do with removal by attorneys or any officers of the courts, but instead was a removal by a federal prison warden and a medical officer being sued by a federal prisoner. This glaring error in the Fifth-Circuit opinion appears to have come directly from page 11 of the Respondent-Appellee's 14 October 2009 Brief to the Fifth Circuit, where the Appellee garbled the holding in a 1973 district-court case, and presented it as the 1969 Supreme Court holding in *Willingham*.

## RESPONDENT'S MISSTATEMENT OF THE CASE

Respondent begins (p.1) by misstating that "[t]his case first began in First City Court for the City of New Orleans", but Respondent is misrepresenting *prior* litigation as "this case". Respondent makes several other misstatements and mischaracterizations, but refutation is not essential for the questions presented here.

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20. *Willingham v. Morgan*, 395 U.S. 402 (1969).

21. App. A to the Petition, Circuit Court Opinion, p.3a.

## CONCLUSION

Because the Fifth Circuit made a broad ruling that officer-of-the-court removal is not available to admitted attorneys, on an issue not appealed to that court; because the district and circuit courts did not apply the proper standard in awarding fee shifting on remand, and declined to follow a rule regarding reasonableness followed by the 7th and 9th Circuits; because the circuit court ordered sanctions for frivolous appeal of an unresolved or novel question; and because the district and circuit courts did not apply a proper lodestar analysis to the quantum of award, but instead looked to the vexatiousness of prior federal litigation, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted:

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